No. 9840

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MURRAY L. McGREW and FRANK T. BOYD,

Plaintiffs in Error,

v.

UNITED STATES OF AMERICA,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

Brief of Defendants in Error

APPEARANCES:

JOHN L. SLATTERY,
United States Attorney.
RONALD HIGGINS,
Assistant U. S. Attorney.
WELLINGTON R. MEGAS,
Assistant U. S. Attorney.
Attorneys for Defendants in Error.

No. 3840.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MURRAY L. McGREW and FRANK L. BOYD,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

IN THE

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MURRAY L. McGREW and FRANK L. BOYD,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

FOREWORD.

For convenience, plaintiffs in error will be referred to here as defendants, and the defendant in error as the government

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STATEMENT OF THE CASE.

As the statement of the case set forth in defendants' brief (pp. 2-5, inc.) is deemed incorrect in that it omits

certain important facts shown by the record, and also because it includes statements not founded on the record, the following statement of facts is submitted by the government.

On the night of November 10, 1921, the defendants were driving an automobile on the public highway in the County of Chouteau in the state and district of Montana, when they were intercepted by the sheriff of said county and one of his deputies, who halted the defendants with firearms and commanded them to leave the automobile. The car was loaded with whiskey which had been obtained in Canada (Tr. 18). The "liquid" was contained in 240 pint bottles or glass containers labeled "Pebbleford," and 24 glass containers of about four ounce size, labeled "Baird's Scotch." (Tr. 15.) The car, with its contents, was seized by said officers, and the defendants were arrested, and on the same day the county attorney of said county filed an information in the state district court for said county, charging the defendants with the crime of illegally possessing and transporting intoxicating liquors. (Tr. 13.) This information was subsequently dismissed on December 12, 1922, by the judge of said state district court, and it was ordered that the property taken by the sheriff from the defendants be returned and redelivered to them. On December 15, 1921, an information was filed in the United States District Court for the District of Montana, charging defendants with violation of the National Prohibition Act, the information being in three counts, two of which charged illegal transportation and the other un-

lawful possession, all as of date November 10, 1921. The charge contained in this information is the one on which the defendants were tried on December 20, 1921, and convicted, and from which judgment of conviction the writ of error herein has been sued out.

After the jury had been impaneled in this cause, the court excused them and heard the petition of the defendants for the return of the said automobile, and the said "liquid," which said petition was filed on December 17, 1921, the date of the arraignment of the defendants on the charge herein, which petition the court denied (Tr. 17), and then proceeded with the trial. The bottles found in the defendants' car "were usual whiskey bottles and labeled accordingly, and were admitted in evidence." (Tr. 19). The deputy sheriff who assisted in the search "tasted liquor from a bottle that the defendants had with them," and it was whiskey (Tr. 22.) The jury returned a verdict of guilty as charged.

At the trial the government produced only two witnesses, namely, U. W. Hammaker and George Campbell, sheriff and deputy sheriff, respectively, of Chouteau County, State and District of Montana, who testified that they, as state officers, without any co-operation with or instructions from any federal officers, on November 10, 1921, made the search, seizure and arrest of defendants and their property. (Tr. 20, 21.) All objections to and motions for dismissal pertain only to the testimony of these two witnesses, acquired while acting as state officers, with no authority from the

government and no collusion with any federal officers. (Tr. 18, 19, 22, 23.)

Defendants offered no testimony or evidence.

ARGUMENT.

I.

Contention by the defendants that the trial court erred "for the reason that the information as laid is in the name of Ronald Higgins, Assistant United States District Attorney, in his own name, he not being a prosecuting officer recognized by law," may be dispensed with at the outset; first, because if there were merit in such contention, the same was waived by defendants in failing to demur, or moving to strike, or interposing some kindred objection, and proceeding to trial; secondly, because defendants failed to incorporate the point in the assignment of errors; (Tr. 28, 29, 30, 31, 32, 33, 34) thirdly, because section 1420, C. S., in part says, concerning the appointment of Assistant United States Attorneys:

> "Whenever in the opinion of the district judge of any district or the chief justice of any territory and the district attorney, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed by the Attorney General, but such opinion shall state to the Attorney General the facts as distinquished from the conclusion, showing the necessity therefor . . . . . ,"

and further, section 538 C. S., provides:

> "The Attorney General shall whenever in his opinion the public interest requires it, employ and

> retain in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, ... "

Which sections, if not in words, inferentially authorize Assistant United States Attorneys to do the same things that a United States Attorney is authorized to do. Any other interpretation puts the office of United States Attorney in a helpless condition when the chief is out of the district, or too ill to serve, or dead, and no successor appointed. It would be just as logical to assert that an Assistant United States Attorney cannot prosecute a case in a federal court, without the presence of the United States Attorney for the same district, as it is to contend that such an assistant cannot in his official name and capacity, file an information in a United States District Court, charging violators of federal criminal statutes with crime; fourthly, because this court has already disposed of the question in the case of

Brown vs. United States, 257 Fed. 703.

II.

Counsel for defendants fails completely to distinguish the acts of the state officers, as such, in the search and seizure and arrest of defendants and their property, and the act of the federal officer in seizing the car and liquor on behalf of the government. It seems to have escaped his observation that all of the testimony given on behalf of the government was supplied entirely by state officers, and such testimony was

based upon acts done, and knowledge acquired by them before the information was filed against defendants, and while acting solely and exclusively as state officers.

Boiled down and simply stated, the assignments under the writ of error, involve the legality of using State officers as witnesses on the part of the government, and permitting them to testify at the trial, to facts learned by them while acting as State officers, and before the filing of the information, in searching the persons and automobile being driven by defendants, without first obtaining a search warrant or warrant of arrest.

Prominent among the cases cited by counsel for defendants to show error is Weeks vs. U. S., 232, U. S. 383, but in selecting this case to uphold his position counsel seems to have left unseen the following language of the court found at page 398:

> "As to papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment (i. e. 4th) applicable to such unauthorized seizure. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal Court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government. Boyd case 116, U. S., supra (616), and see Twining v. New Jersey, 211 U. S. 78."

The same rule is laid down in the case of Young-

blood v. U. S. 266 Fed. 795, and after quoting the above excerpt from Weeks v. U. S., the court says:

> "In the instant case the record shows that the search and seizure were made by the sheriff of that county, an officer of the state of North Dakota, before the indictment in the federal court had been returned, and there is nothing to show that the sheriff acted under the authority of a federal official"

See also:

U. S. v Folloco,
U. S. v. Ross, 277 Fed. 75.
Herine v. U. S., 276 Fed. 806.
U. S. v. O'Dowd, 273 Fed. 600.
U. S. v. Burnside, 273 Fed. 603.

Light is shed upon the question here in the decision of Burdeau, Sp. Asst. Atty. Gen., v. McDowell, 41 Sup. Ct. Rep. 574, wherein it is set forth on page 576:

> " (1) The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.
>
> In the present case the record clearly shows that no official of the federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been

taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the federal government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned."

Further on this opinion holds:

"The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."

III.

Assuming that the search and seizure had been done by federal instead of state officers, without a search warrant or warrant of arrest, even so, the evidence thus obtained would be admissable, because by virtue of the unlawful transportation, as the trial court held, the car and "liquid" became forfeited to the government, and recoverable by federal officers without process.

Boyd v. U. S., 116 U. S. 616.
U. S. vs. Fenton, 268 Fed. 221.

Even to a greater degree then, looking at the case from this angle, was the testimony of the state officers admissible.

IV.

Complaint is registered and error claimed by defendants, that the Court reopened the case and permitted the introduction of some of the liquor transported by the defendants. Such action rests in the sound discretion of the court.

1st Dec. Dig. page 882-5 and cases cited.
2nd Dec. Dig. page 970 et. sequi. and cases cited.
14 Century Dig. Crim. law. Sec. 1619, 1620, 21, 22, 23.

At best, the introduction of the liquor was merely cumulative, and only a slight addition to the testimony previously given, and could have had but small bearing, if any, upon the verdict, since no evidence was supplied by the defense and the case of the government was left uncontradicted.

As a matter fact some bottles of "liquid," identified as some of the bottles taken from defendants' car, and which were usual whiskey bottles and labeled accordingly, were admitted in evidence on the direct examination of the sheriff before the government rested its case. (Tr. 19).

CONCLUSION.

It was not error for the Assistant United States Attorney to file and verify the information herein in his own name; and it was not error for the court to reopen the case to permit the introduction in evidence of

other bottles of whiskey taken from defendants' car; nor was it error for the court to deny defendants' petition for the return of the "liquid," and the suppression of evidence and permit the state officers to testify respecting the search, seizure and arrest.

Respectfully submitted.

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